JUL 24 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1940. No. 275

WALTER K. BARNES, trading as BARNES and LOFLAND,
Defendant-Petitioner,

vs.

L. M. REED, Receiver of the COMMERCIAL NATIONAL BANK OF PHILADELPHIA,
Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND SUPPORTING BRIEF.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, WALTER K. BARNES, trading as BARNES AND LOFLAND, respectfully submits this Petition for a Writ of Certiorari to review the decision of the United States Circuit Court of Appeals for the Third Circuit made and entered June 11, 1940, affirming the judgment for plaintiff of the United States District Court for the Eastern District of Pennsylvania.

SUMMARY STATEMENT OF MATTERS INVOLVED.

This case is an action to enforce as assessment against an alleged stockholder of a closed National Bank. Judgment was entered against the defendant on the pleadings on motion without trial.

Defendant has been for many years engaged as a broker and auctioneer in dealing in stocks and securities, particularly those not listed on regular exchanges. His auction sales and transactions are recognized as fixing the market price of unlisted securities. In the course of his business as a broker he knew that C. F. Hand, President of the Commercial National Bank of Philadelphia, was desirous of purchasing such stock of that Bank as was offered for sale. One Hamilton Vogdes on February 8, 1933 offered to defendant seventy-six shares of that stock. Having arranged for its purchase by Hand, defendant paid Vogdes for the stock certificate endorsed in blank and the next day, being as soon as possible, delivered the certificate to Hand and was reimbursed by him. The stock was never transferred on the books of the Bank from the name of Vogdes.

On February 28, 1933 the Bank suspended business and on September 28, 1934 the Comptroller of the Currency directed an assessment of shareholders of $10.00 per share. No demand was made upon the defendant by the Receiver until May 25, 1938 when notice of the assessment was served upon him and the present suit followed.

Defendant filed an Affidavit of Defense setting up in general terms the above transaction, without the details which would be in evidence at a trial, but with the positive averment that he acted only as a broker in the matter. Plaintiff moved for judgment, and, essentially because the Affidavit of Defense used the word "purchased" in describing the obtaining of the stock certificate from Vogdes, the lower Court directed that judgment be summarily entered for plaintiff.

Upon appeal, the Circuit Court of Appeals for the Third Circuit, while stating that, "The issue presented is a very narrow one", assumed that the defendant had no negotiations with Hand as to his "open offer" to purchase and that therefore defendant in accepting the stock had no relations with Hand and was, for some period of time, the "absolute owner" of the stock. For this reason the judgment of the lower court was affirmed.

OPINIONS OF THE COURT BELOW.

The Opinion of the District Court for the Eastern District of Pennsylvania appears at R. 14 and is not reported officially.

The opinion of the Circuit Court of Appeals for the Third Circuit affirming the judgment of the District Court was filed June 11, 1940 and is not yet officially reported. It is included in the Record as certified by the Clerk of the Circuit Court of Appeals, which is filed herewith.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Sec. I.

ERROR ASSIGNED.

It is respectfully submitted that the Circuit Court of Appeals for the Third Circuit erred in affirming the judgment of the District Court, entered for plaintiff on motion for want of a sufficient Affidavit of Defense.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

The question concerned is an important one to all brokers and dealers in stocks, particularly shares of National Banks. In transactions on behalf of an undisclosed principal a broker may frequently be considered as the principal. Must brokers and dealers hereafter disclose their principal to avoid claims of ownership of bank stock subject to assessment? Must a broker, if sued for such an assessment, aver all the details of his participation in a transaction or is it not sufficient for him to aver that he acted as a broker under a specific direction or offer from a stated person and in fact completed the transaction with that person, without, until trial, setting forth the price, the commission, the date and the other details of the offer? To protect himself, must a broker or dealer in bank stocks have written record authority to purchase for a principal, or may he not act as an intermediary or negotiator between the seller and buyer of the stock?

The present great number of cases in the courts based upon claims arising from assessments for National Bank stock ownership make the determination of such questions of great general importance. No decision of the exact questions here raised has been found. They therefore, it is submitted, "should be settled by this Court".

SUPPORTING BRIEF.

The present question in this case is essentially the meaning of the words used in the Affidavit of Defense as intended by the pleader or as interpreted by the Lower Court. The "Rules of Civil Procedure for the District Courts of the United States" contain, inter alia, the following:

"A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies" (Rule 8(b).

"In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred". (Rule 9(c).

"All pleadings shall be so construed as to do substantial justice". (Rule 8(f).

The entry of judgment for want of a sufficient Affidavit of Defense is in the nature of a summary proceeding and this should not be done unless the matter is "clear and free from doubt".

"Plaintiff's rule for judgment was discharged, the lower court stating in its opinion: 'This being a case where a proper judicial determination of the controversy would be facilitated by an opportunity for a broader inquiry into the facts than presented by the bare pleadings, the rule for judgment is consequently discharged'. Examination of the record definitely indicates that plaintiff's contention is not 'clear and free from doubt' and that the court below rightly refused summary judgment".

RODGERS vs. MANN, 307 Pa. 452-453.

"Obviously, the case is not 'clear and free from doubt' and the court below correctly refused to give judgment on the pleadings."

PYLES vs. BOSLER, 308 Pa. 297-298.

"The plaintiff has moved for judgment for want of a sufficient Affidavit of Defense. On this motion,

all the well-pleaded facts in the Affidavit are to be taken as true".

AUFDERHEIDE vs. MINE SAFETY APPLIANCE COMPANY, 9 Fed. Sup. 918.

It is probable that the transaction in question in this case might have been more accurately described by giving the details of the offer made by Hand to the defendant as a broker, which was still "open" at the time Vogdes offered his stock for sale, and of the confirmation of the offer and the acceptance of Vogdes' stock by Hand. The transaction of the transfer of title to the stock from Vogdes to Hand was all completed at once on February 8, 1933, the physical delivery of the certificate being made the following morning. Perhaps the words "purchase" and "sell" are unfortunate but they were used because the defendant advanced his own money to Vogdes and received a separate check from Hand. It is unqualifiedly averred that the "purchase" from Vogdes was "in contemplation of" the offer of Hand. As such it was "in accordance with" the offer of Hand and the best proof of this is that the stock was delivered to Hand. The transaction was not "for the purpose of ownership, but only in the furtherance of his business as a broker". Under Pennsylvania Law a broker as such may arrange such a transaction without acquiring any interest in the stock.

> "The plaintiffs, undoubtedly, were employed as stock brokers. They acted as an intermediary or negotiator between the defendant and the person from whom the stock was purchased. At that time they had no personal interest in the transaction outside of their commission".

JONES vs. ADAMS, 98 Pa. Superior Ct. 246-249.

The lower court, however, sets aside as meaningless the averment that the defendant in the transaction acted only as broker or intermediary and holds that he became

the owner because "if some other prospective purchaser offered a higher price he was at liberty to sell the stock to that purchaser". Any broker might do so, but if the stock advanced in value he would lay himself open to an action for damages. No matter what the defendant *might* have done in this case he did do that which he avers, to wit, bought in accordance with an offer or arrangement made with Hand and delivered to Hand. Taking as true—as must be done in this proceeding—the averment that he acted only as broker, he was only the conduit in which the stock passed from the registered owner, Vogdes, to the purchaser, Hand.

Since he acted as broker it is immaterial that he paid for the stock with his own money.

> "We reach the conclusion, therefore, that although the broker may not be strictly a pledgee, as understood at common law, he is, essentially, a pledgee and not the owner of the stock, and turning it over upon demand to the customer does not create the relationship of preferred creditor within the meaning of the bankrupt law."
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> * * * * * * * *
>
> "Upon the whole, while it must be conceded that there are incongruous features in the relationship, there seems to be no hardship in holding that a stock-broker is a pledgee; for although it is true that he may advance all or the greater part of the money embraced in the speculation, if he acts honestly, faithfully and prudently, the entire risk is upon the client."

RICHARDSON vs. SHAW, 209 U. S. 366.

> "The plaintiffs, undoubtedly, were employed as stock brokers. They acted as an intermediary or negotiator between the defendant and the person from whom the stock was purchased. At that time they

had no personal interest in the transaction outside of their commission. If the defendant had immediately paid for the stock, the purchase thereof by the plaintiff was a clear act of agency. In carrying the stock until the defendant paid therefor, the plaintiffs were acting as pledgees (Richardson v. Shaw, 209 U. S. 365), but the stock belonged to the defendant and the plaintiffs simply held it as security until the consideration would be paid. They did not acquire the right to dispose of the stock until reasonable opportunity was given the defendant to pay for it."

JONES vs. ADAMS, 98 Pa. Superior Ct. 246-249.

This relationship of broker to the transaction, in which he became pledgee, did not make the defendant liable for the assessment.

"It is, also, undoubtedly true, that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder, but it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner".

ANDERSON vs. PHILADELPHIA WAREHOUSE COMPANY, 111 U. S. 479.

"Assuming then the established doctrine to be that the mere pledgee of national bank stock cannot be held liable as a shareholder so long as the shares are not registered in his name * * *".

OHIO VALLEY NATIONAL BANK vs. HULITT, 204 U. S. 162-168.

The Circuit Court of Appeals, in its opinion interprets the wording of the Affidavit of Defense to mean "It does not appear that he had or gave any committment to

deliver the stock he purchased to the president of the Bank". Certainly this entirely disregards the averment in the Affidavit that the accepting of the stock from Vogdes was "in contemplation of" that said offer, in accordance with which the said stock was sold to the President of the Commercial National Bank. No matter what defendant might have done or to whom he might have sold he avers that he took the stock in accordance with the known arrangement with Hand and that he had no other intention except to carry out that arrangement is shown by the fact that he did do so.

It is therefore respectfully submitted that, even though the pleading might have been differently drawn, it is definitely averred that the defendant acted only as a broker or intermediary in accordance with a previous offer from the purchaser of the stock and that these facts entitle him to a trial at which the details can be shown. Necessarily he communicated with Hand and confirmed the price to be paid before he accepted Vogdes stock. At that particular time the ordinary investor was selling, not buying, bank stocks. The purchasing was being done, just as in this case, by the banks or their representatives to support the market. The evidence will show the difference in the two checks as the commission allowed to Barnes for his activity in the sale. With all the complete facts thus before it the lower court can say clearly and without doubt whether the defendant ever did any act which made him a stockholder or whether he was truly only a broker in the transaction. In order that such a result may be achieved it is respectfully urged that the "pleadings shall be so construed as to do substantial justice" and

1. That this Petition for Writ of Certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above case be granted;

2. That the decision of the Circuit Court of Appeals in the above case be reversed;

3. That such other and further relief in the premises as this Honorable Court may deem proper be granted to your petitioner.

MICHAEL J. RYAN,
Attorney for Petitioner.